

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

CUSTOM DATA SOLUTIONS, INC., a
Michigan corporation,

Plaintiff(s),

vs.

Case No. 2004-3376-CK

PREFERRED CAPITAL, INC., an
Ohio corporation and COMMERCE
COMMERCIAL LEASING, LLC, a New
Jersey limited liability company,

Defendants.

OPINION AND ORDER

Defendant Preferred Capital, Inc. ("Preferred") has filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff has also filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10).

This matter involves the sale of telecommunications services and products. Plaintiff entered into a telecommunications services agreement and five equipment rental agreements with Norvergence, Inc., a New Jersey corporation. The equipment rental agreements were for a "matrix" box that Norvergence would install on customer's premises. Norvergence required the rental agreements in order for the customer to receive the total telecommunications services and products package that allegedly would provide telephone, cellular, and internet services at dramatic savings. Two of the equipment rental agreements procured by Norvergence from Plaintiff were assigned to Commerce Commercial Leasing, LLC ("Commerce"). Three of the equipment rental agreements procured by Norvergence from Plaintiff were assigned to Preferred.



Plaintiff alleges that Norvergence was unable to provide the telecommunication services to Plaintiff. Despite this fact, Defendants have attempted to collect under the assigned rental agreements. Plaintiff filed suit against Defendants in an attempt to protect itself from collection under the assigned rental agreements. On September 2, 2004, Plaintiff filed an amended complaint against Defendants, alleging breach of contract in count 1; breach of express and implied warranty in count 2; fraud in the inducement in count 3; innocent misrepresentation in count 4; civil conspiracy in count 5; and declaratory relief in count 6.

Preferred contends that summary disposition is appropriate on Plaintiff's claim for fraud as a matter of law, since Plaintiff's complaint relies upon future promises that cannot constitute actionable fraud. Preferred contends that Plaintiff's claim for breach of contract fails because Plaintiff relies upon oral representations that are precluded by the merger clause contained in the rental agreement contract. Preferred contends that Plaintiff's claim for fraud in the inducement is also precluded by the merger clause contained in the equipment rental agreements. Preferred contends that Plaintiff cannot reject the equipment rental agreements based upon fraud or misrepresentation since it accepted the equipment after inspection in accordance with the UCC. Preferred contends that Plaintiff's claim for express or implied warranty fail since all warranties were specifically disclaimed in the rental agreements. Preferred contends that Plaintiff's claim for conspiracy fails because all of Plaintiff's other theories fail. Finally, Preferred contends that Plaintiff's complaint fails to allege all the requirements to have the contracts declared null and void based upon them being unconscionable.

Plaintiff contends that the equipment rental agreement is voidable because it was induced by Norvergence's fraudulent and/or innocent misrepresentations. Plaintiff contends that the parol evidence rule does not preclude the Court from relying upon Norvergence's fraud and

misrepresentation to void the equipment rental agreements, and that the equipment rental agreements are not finance leases.

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party "has failed to state a claim on which relief can be granted." *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

A motion pursuant to MCR 2.116(C)(10) on the other hand, provides for summary disposition where there is no genuine issue with respect to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact and the moving party is entitled to judgment as a matter of law. *Quinto v. Cross & Peters Co.*, 451 Mich. 358, 362, 547 N.W.2d 314 (1996). In addition, all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties are viewed in a light most favorable to the party opposing the motion. *Id.* Where the burden of proof on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Id.* Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.*, at

363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen. Motors Co*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The Court will first address Preferred's argument that Plaintiff's claim for fraud fails as a matter of law since Plaintiff failed to allege false statements regarding a past or existing fact. This argument need not be addressed since Plaintiff's first amended complaint does not allege a claim of fraud.

The Court will next address Preferred's argument that Plaintiff's claim for breach of contract fails based upon the inclusion of a valid merger clause, and that there was no breach of the written terms of the equipment rental agreement. In order to establish a prima facie claim for breach of contract, plaintiff must allege and prove the parties are competent to contract, proper subject matter, legal consideration, mutuality of agreement, mutuality of obligation, and breach. *Mallory v City of Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). The main goal in the interpretation of contracts is to honor the intent of the parties. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349; 605 NW2d 360 (1999). Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. *Meagher v Wayne State University*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997). If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. *Id.*, at 722. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. *Id.* The language of a contract should be given its ordinary and plain meaning. *Id.* Parol evidence is not admissible to vary a contract that is clear and

unambiguous, but may be admissible to prove the existence of an ambiguity and to clarify the meaning of an ambiguous contract. *Id.*

Plaintiff has provided the with the affidavit of Michael Nudi to support its claim that the equipment rental agreement was part and parcel of the total telecommunication services that were to be provided to Plaintiff. Plaintiff has also provided the Court with the affidavit of Ronald Zirkin, Vice-President of Norvergence, who attested to the fact that Norvergence could not and did not provided the services promised as part of the contract. Preferred has failed to refute these factual assertions. Instead, Preferred attempts to separate the equipment rental agreement from the services to be provided through the matrix boxes that comprised the equipment in the equipment rental agreement. The Court is not persuaded by this argument. It is clear that the equipment rental agreements were part of the "services" to be provided, and constituted one contract for services and equipment. Since the services were not provided, the whole contract fails, and therefore Plaintiff's motion for summary disposition on its claim for breach of contract should be granted.

The Court will next address Plaintiff's claim for fraud in the inducement. Preferred contends that the merger clause defeats Plaintiff's claim. Fraud in the inducement occurs when a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon. *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). Our Supreme Court has held that future promises ordinarily do not constitute fraud because they are contractual in nature, but there is an exception for promises made in bad faith. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336-338; 247 NW2d 813 (1976). The rule is that a fraudulent misrepresentation may be based upon a promise made in bad faith without intention of performance. *Id.* The evidence of

fraudulent intent must relate to conduct at the time that the representation was made or almost immediately thereafter. *Hi-Way Motor Co, supra* at 338-339. Thus, Plaintiff must show that Norvergence did not intend to fulfill the promise at the time the promise was made. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 379; 689 NW2d 145 (2004).

While parol evidence is generally admissible to prove fraud, fraud that relates solely to an oral agreement that was nullified by a valid merger clause would have no effect on the validity of the contract. *UAW-GM Human Resource Center v KSL Recreation Co*, 228 Mich App 486, 503; 579 NW2d 411 (1998). Thus, when a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself, i.e., fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause. *Id.*

Plaintiff has provided uncontroverted evidence that the agreement for a total communications package, and the accompanying equipment rental agreements were the result of a fraudulent scheme by Norvergence to finance the services that Norvergence was promising to provide to Plaintiff and others. The evidence presented relating to the fraud used to induce Plaintiff into the service and equipment contracts establishes fraudulent inducement and invalidates the entire contract including the merger clause. The Court is satisfied that Plaintiff's reliance upon the representations made by Norvergence was reasonable, and that the UCC and the provisions regarding rejection of goods does not apply to the case at hand. Consequently, the merger clause in the equipment rental agreements is insufficient to prevent Plaintiff from introducing evidence of fraud, and Plaintiff's motion for summary disposition to void the contract should be granted.¹

¹ Based upon this finding, the Court will not address the remainder of the arguments of the parties.

Based upon the reasons set forth above, Plaintiff's motion for summary disposition is GRANTED. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last claim and closes the case.

IT IS SO ORDERED.

Diane M. Druzinski, Circuit Court Judge

Date:

MAY 11 2006

DMD/aac

cc: Frederick A. Berg, Esq.
Leslie Anne Logan, Esq.

DIANE M. DRUZINSKI
CIRCUIT JUDGE

MAY 11 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: *[Signature]* Court Clerk